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No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA UTILITIES COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF OF THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA UTILITIES COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The State of North Carolina and the North Carolina Utilities Commission submit herewith this brief as *amici curiae* in support of the petition for certiorari filed jointly by Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., and the National Association of Regulatory Utility Commissioners ("Petitioners") seeking review of the decisions of the United States Court of Appeals for the Fifth Circuit in

United States v. *Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983) (Unit B *en banc*), and *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982) (Unit B).

INTEREST OF AMICI CURIAE

The State of North Carolina has enacted a comprehensive statutory scheme for the regulation of all public utilities in North Carolina, including motor common carriers of property. North Carolina General Statutes (NCGS) § 62-3(23)a.4 *et seq.* (1982) (the North Carolina Public Utilities Act). Pursuant to this legislation, it is the exclusive responsibility of the North Carolina Utilities Commission to fix and establish rates for all motor common carriers of property subject to its jurisdiction.

As the agency of the State charged with the duty of administering the Public Utilities Act, the North Carolina Utilities Commission has been accepting and acting upon collective motor carrier rate proposals since 1943 from three motor carrier rate bureaus—the North Carolina Motor Carriers Association ("NCMCA"), the Southern Motor Carriers Rate Conference ("SMCRC"), and Motor Carriers Traffic Association ("MCTA"). These carrier rate bureaus were defendants in this case in the District Court, and two rate bureaus—SMCRC and NCMCA—appealed to the Court of Appeals and have petitioned this Court.

In 1977 the legislature of North Carolina enacted NCGS § 62-152.1 establishing a procedure for the approval of collective rate agreements among the carriers. This legislation expressly authorizes collective rate-proposing by the rate bureaus in North Carolina.

The issue in this case is whether the collective rate-proposing activities of the petitioner rate bureaus in North Carolina are immune from the federal antitrust laws. Since the State of North Carolina has affirmed the importance of collective ratemaking as a means of furthering its overall motor carrier transportation policy, the outcome of this case will determine whether the State of North Carolina will retain the freedom to pursue its long-established regulatory policies with respect to motor carrier ratemaking. Thus, the State of North Carolina and the North Carolina Utilities Commission have a direct interest in the outcome of this litigation. Consequently, the State of North Carolina and the North Carolina Utilities Commission believe that certiorari should be granted in this case.

SUMMARY OF ARGUMENT

The State of North Carolina and the North Carolina Utilities Commission support the reasons for granting the writ set forth by the Petitioners in their Petition. In this brief the *amici curiae* wish to emphasize that the State of North Carolina has a critical and long-standing interest in regulating the intrastate rates of motor carriers subject to its jurisdiction and that the collective rate-proposing activities of the motor carrier rate bureaus are essential in furthering the policy of the State that motor carrier rates be just and reasonable and nondiscriminatory. The regulatory procedure for establishing motor carrier rates in North Carolina allows the North Carolina Utilities Commission to subject the rate proposals of the rate bureaus to rigorous analysis and investigation. This procedure includes the active participation of the Public Staff of the North Carolina Utilities Commission and the Attorney General of North Carolina, both of which represent the using and consuming public.

If the decision of the District Court is left undisturbed, the State of North Carolina will be required to abandon its regulatory scheme of determining motor carrier rates by collective rate-proposing. The ability of the State of North Carolina to ensure that carrier rates are just, reasonable, and nondiscriminatory will consequently be impaired.

ARGUMENT

The Application Of The State Action Doctrine By The Court Of Appeals Fails To Recognize (1) The Critical And Long-Standing Interest Of The State Of North Carolina In Regulating The Rates Of Intrastate Motor Carriers And (2) The Adverse Impact On The State Of North Carolina And Its Utilities Commission If The Decision Of The District Court Is Allowed To Stand

The State of North Carolina has enacted a comprehensive statutory scheme for the regulation of all public utilities in North Carolina, including motor common carriers of property. See North Carolina General Statutes (NCGS) Chapter 62 (the North Carolina Public Utilities Act). Pursuant to this legislation, it is the responsibility of the North Carolina Utilities Commission (hereinafter "NCUC") to administer and enforce the Public Utilities Act and to require that all public utilities in North Carolina, including motor carriers, provide adequate and efficient service at rates that are just and reasonable and nondiscriminatory. NCGS § 62-2.

With respect to the regulation of motor carriers, NCGS § 62-259 provides:

> "*Additional declaration of policy for motor carriers.* In addition to the declaration of policy set forth in G.S. 62-2 of Article 1 of Chapter 62, it is declared the policy of the State of North Carolina to preserve and continue all motor carrier transportation services

> now afforded this State; and to provide fair and impartial regulations of motor carriers in the use of public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportaion; to promote and preserve adequate economical and efficient service to all the communities of the State by motor carriers; to encourage and promote harmony among all carriers and to prevent discrimination, undue preferences or advantages, or unfair or destructive competitive practices between all carriers; to foster a coordinated statewide motor carrier service; and to conform with the national transportation policy and the federal motor carriers acts insofar as the same may be practical and adequate for application to intrastate commerce."

Since the early 1940's, the NCUC has been charged with the exclusive responsibility to fix and establish rates for all motor common carriers of property subject to its jurisdiction. The statutes require the NCUC to "make, fix, establish, or allow just and reasonable rates." NCGS § 62-130. The policy expressed in the North Carolina statutes is that the NCUC establish motor carrier rates for the shipping public that are just and reasonable and nonpreferential and nondiscriminatory. NCGS § 62-140. It cannot be emphasized strongly enough that motor carrier rates in North Carolina are fixed and established by the NCUC and not by the motor carrier rate bureaus.

As the record in this case discloses, there are approximately 600 motor common carriers in North Carolina that are subject to the jurisdiction of the NCUC with respect to rates and service. Although the procedure of the NCUC contemplates applications for rate increases by an individual motor carrier or by one or more carriers filing applications through rate bureaus, the overwhelming majority of motor carrier rates are filed collectively through the carrier rate bureaus. The NCUC has been

accepting and acting upon collective rate proposals since 1943 from three rate bureaus—the North Carolina Motor Carriers Association, the Southern Motor Carriers Rate Conference, and Motor Carriers Traffic Association, Inc. These three rate bureaus were defendants in the District Court, and two of the rate bureaus—the SMCRC and the NCMCA—appealed to the Court of Appeals and have petitioned this Court for certiorari.

The practice and procedure of the NCUC require that the three rate bureaus play an important role in proposing intrastate motor carrier rates in North Carolina. In 1949 the NCUC requested that the three rate bureaus file their collective rate proposals with the same effective date. Rule 4-4(b) of the NCUC, which has been in effect since 1945, provides that applications for permission to change or establish motor carriers' rates on less than statutory notice must be made "by the carrier *or the agent holding authority to file the proposed publication.*" Since 1947, legislation in North Carolina has provided that service of NCUC orders and notices may be made upon the carrier involved or the "agent who has filed a tariff or schedule in behalf of such carrier." NCGS § 62-270. Pursuant to this legislation, the NCUC since 1947 has been routinely sending orders and notices to the three carrier rate bureaus on behalf of their member carriers. From 1947 until the present time, approximately ninety percent of the general commodity motor carrier rate proposals to the NCUC have been made by the three rate bureaus on behalf of their member carriers. (R 1323).

Consequently, the collective rate proposals of the three rate bureaus have played an important role since the early 1940's. In fact, the Commission regards the collective activity of the rate bureaus as essential to the efficient regulation of intrastate rates. The NCUC's Director

of Transportation stated in his affidavit in the District Court: "If collective rate proposals by the three rate bureaus in North Carolina are enjoined by this Court, in my opinion, it would have severe consequences on the regulation of the motor carrier industry in North Carolina."

The legislature of North Carolina affirmed the importance of the collective rate proposing activity in 1977 when it enacted NCGS § 62-152.1, establishing a procedure for the approval of joint rate agreements among carriers. This legislation expressly authorized collective rate proposing in North Carolina. Subsection (b) of the statute declares:

> "For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class."

The statute contemplates that carriers will apply to the NCUC for approval of agreements respecting collective rate action. The NCUC must approve these agreements if it finds that such approval will further the overall goals of regulation expressed in NCGS § 62-2 and the transportation policy expressed in NCGS § 62-259. Subsection (h) of the statute provides that, upon approval of the agreement, the parties thereto are "relieved from the operation of the antitrust laws with respect to the making of such agreement."

The NCUC in 1977 established Rule R4-12 which sets out a procedure to implement NCGS § 62-152.1. An application for the approval of a joint rate agreement among carriers must contain, among other information, a copy of the rate agreement, the constitution and by-laws of the rate bureau, and a statement showing that the goals of

the rate agreement will further the transportation policy of the State of North Carolina.

The affidavits filed by the Staff of the NCUC in this case set out in comprehensive detail the procedures followed by the NCUC, the Public Staff of the NCUC, and the Attorney General of North Carolina when proposals for motor common carrier rates are filed with the NCUC. (R 1318 and R 1322). In summary, these affidavits show:

1. Carriers and rate bureaus proposing a rate change must file the proposed tariff with the NCUC thirty (30) days prior to its effective date. NCGS § 62-134 and NCUC Rules R1-15 and R1-17. Any such filing must be accompanied by justification and data; the data is extensive if a general rate increase is being proposed. NCUC Rule R1-17. The Chief Clerk of the NCUC distributes the rate proposals to the NCUC Staff, the Public Staff, and the Attorney General. Either the NCUC Staff, the Public Staff, or the Attorney General may, within the 30-day period prior to the rate's effective date, request the NCUC to exercise its power to suspend a rate proposal pending further investigation and hearing. (R 1319-1321). The NCUC convenes on a weekly basis to hear these recommendations from the Public Staff, the NCUC Staff, or other interested parties; the NCUC then determines whether further investigation and hearings are needed. The NCUC, of course, on its own motion may suspend a filing and set it for hearing and investigation. NCGS § 62-134(b).

2. In cases involving general commodity general rate increases, the NCUC always suspends the tariff filing for further investigation and almost always conducts a hearing to determine the reasonableness of a rate proposal. (R 1325). Investigations and hearings are usually ordered even for filings involving less than general rate increases.

3. Once a hearing is set, the Public Staff, on behalf of the using and consuming public, performs a more intensive analysis and investigation of the rate proposals. (R 1320).

4. The hearings of the NCUC are subject to public notice and are open to the public. (R 1325). At the hearings the Public Staff appears through its counsel and presents testimony and cross-examination. The Public Staff's testimony embodies a rate recommendation which is based on its independent investigation and analysis. This recommendation is almost always different from and lower than the proposals of the rate bureaus. The Public Staff has been very successful in having the NCUC adopt its recommendations and reject those proposed by the carriers. There are numerous instances where the NCUC has rejected or substantially modified rate proposals filed by the carrier bureaus. (R 1325).

The Public Staff was created by the North Carolina legislature in 1977 as a new—and independent—agency in the NCUC. The Public Staff, which is headed by an Executive Director appointed by the Governor, represents the using and consuming public in all proceedings before the NCUC, including motor common carrier rate cases. NCGS § 62-15. The Public Staff consists of attorneys, accountants, engineers, economists, and rate specialists. There are eighteen Public Staff employees directly involved with motor common carrier rates on a daily basis, including the Executive Director, eight rate specialists, three accountants, and six attorneys. When motor carrier rate proposals are filed by the three rate bureaus, they are reviewed and thoroughly analyzed by the Public Staff.

The Attorney General of North Carolina is also authorized to represent the using and consuming public in all

matters before the NCUC. NCGS § 62-20. The Attorney General maintains a separate utility division headed by a Special Deputy Attorney General to carry out this duty. Both the Attorney General and the Public Staff have the power to appeal NCUC orders to the appellate Courts of the State. NCGS § 62-15 and § 62-20.

The North Carolina Utilities Commission establishes and determines intrastate motor carrier rates pursuant to and in furtherance of the comprehensive scheme enacted by the North Carolina Legislature in the Public Utilities Act. The Commission does not "rubber stamp" the collective rate proposals filed by the rate bureaus. Nor is it accurate to say, as was stated in the Order of the District Court, that the relationship between the rate bureaus and the regulatory process "ranges from friendly to intimate." The Commission's procedure for the setting of motor carrier rates subjects the carriers' rate proposals to rigorous analysis and investigation. As pointed out by the Commission's Director of Transportation in his affidavit:

> "To my knowledge, there has never been a general rate increase proposal on general commodities by motor carriers in North Carolina that has not been suspended by the Commission and thoroughly investigated by the Commission (now Public Staff); and, with the exception of the emergency fuel surcharge allowed on an interim basis to the motor carriers during the 1974 Arab Oil Embargo, to my knowledge, there has never been a motor carrier general commodity general rate increase granted by the Commission without a hearing before the Commission."

The Commission's active role in fixing carrier rates has worked well to protect the shipping public in the State. According to the NCUC's Director of Transportation,

North Carolina intrastate motor carrier rates were approximately 25 percent below interstate motor carrier rates.

The record in this case demonstrates that motor carrier rates in North Carolina have been determined largely through collective ratemaking since the 1940's. From 1947 to 1978, approximately ninety percent of the motor carrier rate proposals to the NCUC have been made by the three rate bureaus on behalf of their member carriers. In view of the hundreds of motor carriers franchised to do business in North Carolina intrastate commerce, the NCUC regards the collective activity of the rate bureaus as necessary to the efficient regulation of intrastate carrier rates. The NCUC's Director of Transportation stated in his affidavit: "If collective rate proposals by the three rate bureaus in North Carolina are enjoined by this Court, in my opinion, it would have severe consequences on the regulation of the motor carrier industry in North Carolina." The Director elaborated further on the "severe consequences" on motor carrier rate regulation in North Carolina if collective ratemaking were abolished:

> "All carriers would be put to the added expense of preparing and filing individual rate proposals and maintaining individual tariffs, which added expense would be reflected in higher rates to the shippers. While large carriers might be able to absorb these increased administrative expenses, they would have a severe adverse effect on small carriers. Furthermore, small carriers would run the risk of domination by larger carriers who could transport products on a volume basis. Shippers would also be put to the increased administrative expense of maintaining additional personnel to analyze the numerous rate proposals brought about by individual tariff filings and to contest proposals before the Commission. Finally, the staff and budget of both the Public Staff

> and the Commission would have to be greatly increased in order to properly handle the greatly increased individual rate proposals and tariff filings." (R. 1318).

An examination of the North Carolina Public Utilities Act discloses that the State of North Carolina has chosen, in furtherance of its overall motor carrier transportation policy, to substitute the regulation of motor carrier rates for competition. The economic regulation of motor carrier rates by the State is in furtherance of the expressly announced goals to provide just and reasonable rates for motor carrier transportation without unjust discrimination or undue preferences; to promote and preserve adequate economical and efficient service to all the communities of the State by motor carriers; and to foster a coordinated statewide motor carrier service. NCGS § 62-2; § 62-130; § 62-140; § 62-259. The State should retain the freedom to pursue its regulatory policies with such flexibility as will meet the needs of its citizens. If the decision of the District Court is left undisturbed, the State of North Carolina will be required to abandon its regulatory scheme of determining carrier rates by collective rate proposing and to determine carrier rates based upon the separate rate applications of more than 600 individual motor carriers. The result will be the inability of the State of North Carolina to discharge its duty to ensure that motor carrier rates are just, reasonable, and nondiscriminatory.

CONCLUSION

For the foregoing reasons the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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